

Determining the legal nature and content of EIAs in International Environmental Law: What does the ICJ decision in the joined *Costa Rica v Nicaragua/Nicaragua v Costa Rica* cases tell us?

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The recent joined cases that brought Costa Rica and Nicaragua into conflict before the International Court of Justice (ICJ) concerned the two states' activities in the border area. In particular, they focused on the dredging of some parts of the shared San Juan river by Nicaragua, and the construction of a road by Costa Rica on the other side of the same river. In neither of the cases had the countries conducted an environmental impact assessment (EIA) prior to the start of the activities. The question of compliance with the obligation of both countries to conduct an EIA was therefore a central part of the case, especially since the area under scrutiny had been designated as a wetland of international importance under the Ramsar Convention. This treaty imposes certain substantive and procedural obligations on parties to promote the 'wise use' of wetlands in their territory.¹ However, the Ramsar Convention does not contain an express obligation to conduct an EIA and so the claims on this subject were decided exclusively as a matter of customary international law.² In evaluating the case, it is important to ap-

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¹ Convention on Wetlands of International Importance, (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 ('Ramsar Convention'), 169 contracting parties at the time of writing. The parties had alleged violations of arts 3(2) and 5 of the Ramsar Convention, requiring notification and consultation, but the Court dismissed these claims; see *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Joined Cases 16 December 2015) [2015] ICJ Rep ('Costa Rica v Nicaragua/Nicaragua v Costa Rica') paras 109-110, 172.

² It had also been alleged that there had been a breach of Article 14 of the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993) 1760 UNTS 79, relating to EIA, but the Court held that 'the provision at issue does not create an obligation to carry out an environmental impact assessment before undertak-

preciate the nature of customary international law as a dynamic source of law, but one which sets a high threshold for demonstrating that developments have taken place.³

The Court began its judgment on this issue by reaffirming its jurisprudence developed in the *Pulp Mills* case,⁴ and confirming that the obligation to conduct an EIA is one of general international law.⁵ The Court goes on to immediately clarify a number of matters that had been unclear in its previous judgment on this matter. Firstly, the judgment removes any doubt that the obligation to conduct an EIA applies to all activities that have the potential to cause ‘a significant adverse impact in a transboundary context’⁶, and not just to the types of ‘industrial activities’ that had been at issue in previous cases. Secondly, the judgment makes it clear that the content of an EIA is not completely dependent on domestic legislation, but is to be assessed against international standards.⁷ The clarification addresses any confusion that had been caused by the *Pulp Mills* case, which emphasized the importance of national laws in the implementation of the customary rule. According to the Court in the present case, ‘determination of the content of the environmental impact assessment should be made in light of the specific circumstances of the case.’⁸ In other words, states must carry out their obligation with due diligence.⁹

When it comes to the nature and source of the obligation relating to EIA, however, the 2015 judgment unfortunately leaves unresolved some

ing an activity that may have significant adverse effects on biological diversity’. Costa Rica v Nicaragua/Nicaragua v Costa Rica, para 164.

³ The Court has said that it is necessary to prove ‘extensive and virtually uniform’ state practice in order to establish a rule of customary international law; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark/Netherlands)* (Merits 20 February 1969) [1969] ICJ Rep 1969 para 73. In the Glamis Gold Arbitration, the Tribunal noted ‘it is difficult to establish a change in customary international law’ and the burden of proof falls upon the claimant to establish such a change; *Glamis Gold v United States of America*, UNCITRAL Arbitration (8 June 2009) paras 602-603.

⁴ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits 20 April 2010) ICJ Reports 2010 (‘Pulp Mills’) para 204.

⁵ *Costa Rica v Nicaragua/Nicaragua v Costa Rica* (n 1) para 104.

⁶ *ibid.*

⁷ *ibid.* See also the Separate Opinion of Judge *ad hoc* Dugard para 18.

⁸ *Costa Rica v Nicaragua/Nicaragua v Costa Rica* (n 1) para 104.

⁹ See J Harrison, ‘Significant International Environmental Law Cases: 2015-2016’ (2016) 28 *J Environmental L* 533, 537-538.



of the ambiguity of the *Pulp Mills* case. This is in part because of the continuing reference to ‘general international law.’ Whilst this terminology has the advantage of not directly mentioning either customary international law or general principles of law, it leaves the source of the obligation ambiguous. Despite the fact that the Seabed Disputes Chamber in its 2011 Advisory Opinion described EIA as a ‘general obligation under customary international law’,¹⁰ the Court did not take this further step and only referred to its previous dicta in the *Pulp Mills* case. However, it is widely accepted that the Court’s reference to general international law should be interpreted as a reference to customary international law.¹¹ Even if this is accepted, there are questions about how to identify the scope and content of such an obligation. The openness of the judgment on this question allowed the judges on the bench to express different opinions on the matter. Indeed, several judges disagreed as to whether the obligation to conduct an EIA exists as an independent customary rule or as an intrinsic part of the obligation of due diligence. These different approaches to the methodological determination of the obligation to conduct an EIA will be closely examined in the remainder of this analysis.

In his separate opinion, Judge *ad hoc* Dugard argues that trans-boundary EIA is a separate obligation sustained by state practice and *opinio juris*. Indeed, he asserts that the obligation to conduct an EIA ‘is not [...] dependent on the obligation of a State to exercise due diligence in preventing significant harm’.¹² Rather, he describes due diligence as ‘the standard of care required when carrying out the EIA and not the obligation itself’.¹³ As the obligation to conduct an EIA is independent, Judge *ad hoc* Dugard argues, the question of its legal nature has to be assessed separately, concluding that there is enough evidence of *opinio juris* and state practice to establish such an obligation as a matter of customary international law.¹⁴ There is some support for this ap-

¹⁰ *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (1 February 2011) ITLOS Case No 17 (‘Sponsoring States Advisory Opinion’) para 145.

¹¹ See Separate Opinion Judge Donoghue, para 2; Separate Opinion of Judge *ad hoc* Dugard para 17.

¹² Separate Opinion of Judge *ad hoc* Dugard para 9.

¹³ *ibid.*

¹⁴ *ibid* paras 12-17.

proach in the *Pulp Mills* case, where the ICJ found that '[state] practice, ... in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context.'¹⁵ Yet, as is common in its practice¹⁶, the Court did not expressly identify the relevant evidence in this regard, nor did Judge *ad hoc* Dugard take up this challenge.

By contrast, Judge Donoghue's separate opinion¹⁷ argues that state practice and *opinio juris* are not the only means of identifying rules of customary international law, which may also be deduced from 'fundamental parameters of the international legal order.'¹⁸ For Judge Donoghue, reliance on state practice and *opinio juris* is problematic in the context of EIA, because of the lack of evidence before the Court. In this respect, she specifically says that without proof of *opinio juris* and state practice, 'the Court is not in a position to articulate specific rules'.¹⁹ Moreover, she clearly is of the view that 'the Court is ill-equipped to conduct its own survey of the laws and practices of various States on this topic.'²⁰ In comparison, Judge Donoghue argues, the deduction of rules from the fundamental parameters of the international legal order is a more straightforward exercise. In her opinion, one parameter relevant to the case at hand is the principle of due diligence, which itself is deduced from the principle of the sovereign equality of states. This leads Judge Donoghue to conclude that 'the rights and obligations of parties should be assessed with reference to the underlying due diligence obligation' and 'the question whether a proposed activity calls for specific measures, such as an environmental impact assessment [...] should be judged against this underlying obligation of due diligence'.²¹ She further asserts that the 'requirement to exercise due diligence, as

¹⁵ *Pulp Mills* (n 4) para 204.

¹⁶ See eg the recent discussion in S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *Eur J Intl L* 417.

¹⁷ Judge Owada is of the same opinion; see Separate Opinion of Judge Owada paras 18 and 21.

¹⁸ Separate Opinion of Judge Donoghue para 3.

¹⁹ *ibid* para 10.

²⁰ *ibid* para 18.

²¹ *ibid* para 1.

the governing primary norm, is an obligation of conduct that applies to all phases of a project'.²² She argues that the obligation of due diligence is to be assessed in light of particular circumstances, and can mean that different obligations spring from them accordingly.²³ This approach arguably allows more flexibility than the approach taken by Judge *ad hoc* Dugard.

This debate about the source of the obligation to carry out a trans-boundary EIA is not merely an academic discussion. Its practical implications are clearly illustrated by the closely related question of whether obligations to notify and consult with the other countries potentially affected by an activity are attached to the obligation to conduct an EIA. Does such an obligation stem from the consolidated practice *and opinio juris* of states on the matter, or does it arise independently through application of the principle of due diligence? The judgment is once again ambiguous on this point, simply saying that 'if the [EIA] confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.'²⁴ From this statement, it would seem that consultation is only required following the conduct of an EIA. Yet, Judge Donoghue considers that it is too reductive to attach the obligation to consult and notify as a follow-up to the conduct of an EIA, and suggests that the obligation to consult and notify can exist independently from the obligation to conduct an EIA, as it also stems from the general obligation of due diligence. Thus, she argues, the obligation to consult may also arise, in certain circumstances, prior to conducting an EIA.²⁵

There may be further ramifications of adopting either of these positions, including on the stringency of the requirements imposed on states. In this respect, Judge *ad hoc* Dugard warns:

'the danger of viewing the due diligence obligation as the source of the obligation to perform an EIA is that it allows a State to argue, retro-

²² *ibid* para 9.

²³ *ibid* para 24.

²⁴ *Costa Rica v Nicaragua/Nicaragua v Costa Rica* (n 1) para 104.

²⁵ Separate Opinion of Judge Donoghue para 21.

spectively, that because no harm has been proved at the time of the legal proceedings, no duty of due diligence arose at the time the project was planned.’²⁶

Furthermore, there is no doubt that classifying this as a question of due diligence to be answered on a case-by-case basis creates a degree of ambiguity about what is required from states, thereby undermining the preventative effect of customary rules. As the Seabed Disputes Chamber stated in its Advisory Opinion in 2011, due diligence ‘may not easily be described in precise terms’ because it is ‘variable’. It may change ‘over time’ and ‘in relation to the risks involved in the activity’.²⁷ The commentary to the ILC Draft Articles on the Prevention of Transboundary Harm explains further that ‘due diligence is manifested in reasonable efforts by a State to inform itself of factual or legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them’.²⁸ This criticism relating to the ambiguity of due diligence, whilst apt, is not without a response. Even if the due diligence standard may be variable, it is still possible to derive some content from it.

Firstly, the substantive content of the due diligence obligation can be informed through the application of the procedural elements of due diligence, such as the obligation to notify and consult the potentially affected states. If this obligation can apply to the preliminary phases of preparing an EIA (ie screening and scoping), as suggested by Judge Donoghue, it can also help to shape the actual content of the EIA, by ensuring that the process is subject to external scrutiny.

Secondly, the obligation of due diligence must be interpreted in light of the development of more specific rules or procedures on the conduct of EIAs, through which states agree on what steps should be taken when carrying out an EIA. Many of these subsequent developments take the form of so-called ‘soft law’, such as the UNEP Goals and Principles on EIA or the Voluntary Guidelines for Biodiversity-Inclusive Impact Assessment adopted under the Convention on Biolog-

²⁶ Separate Opinion of Judge *ad hoc* Dugard para 10.

²⁷ *Sponsoring States Advisory Opinion* (n 10) para 117.

²⁸ International Law Commission, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities’ submitted as a part of the Commission’s report to the UN General Assembly UN Doc A/56/10 (2001) 154.



ical Diversity.²⁹ Given the explicit non-binding status and lack of normative language in such instruments, it may be difficult to argue that such 'soft law' instruments have influenced the development of mandatory rules that must be followed in each and every case.³⁰ Yet, it is not necessary to argue that these instruments have attained the status of customary international law in order for them to play a role in this context, as states may simply use compliance with such instruments as evidence that they have acted with due diligence. It is in this respect that states would be well advised to pay heed to soft law instruments relating to EIA, with a view to defending potential claims that they have not exercised due diligence.

Even if it is accepted that it is possible to give some more specific content to the due diligence obligation, we are still left with a relatively weak and obscure standard. Indeed, one of the criticisms of this case is that the Court did not go far enough in setting a rigorous standard for EIA as a matter of customary international law. Yet, one must remember that courts are not law-makers. It could also be argued that we should not place all of our hopes for the development of EIA on customary international law, which by its very nature tends to follow, rather than set, trends of innovative practice. Whilst custom plays an important role in ensuring that there is a safety net of minimum environmental standards that must be followed by all states, it is highly optimistic to think that custom should be the main source of rules for environmental protection. It is arguably because they offer the possibility of developing more detailed rules of conduct that we have witnessed such a proliferation of environmental treaty-making in the past decades. As Judge Bandhari showed in his separate opinion,³¹ the customary obligation already co-exists with the Espoo Convention³², which despite originating as a regional treaty, has been opened to participation from a

²⁹ Convention on Biological Diversity (adopted 5 June 1992, in force 29 December 1993) 1760 UNTS 79. See CBD COP Decision VIII/28 (2006). This instrument has particular relevance in the present context, given that the guidelines have been expressly endorsed by the parties to the Ramsar Convention; see Ramsar COP Decision X.17 (2008).

³⁰ See eg *Pulp Mills* (n 4) para 205.

³¹ Separate Opinion of Judge Bandhari para 24.

³² Convention on Environmental Impact Assessment in a Transboundary Context, (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309 ('Espoo Convention').

much broader range of states. What this text adds is a potential basis for what Judge Bandhari calls ‘an exemplary standard for the process to be followed when conducting an EIA.’³³ There is little doubt that the Espoo Convention has the potential to take on the role of a global regime for transboundary EIA, but it falls far short at present, with only 45 parties, mostly coming from Europe.³⁴ Encouraging participation in this treaty would therefore be an alternative means of promoting robust standards for the conduct of EIAs at a global level.

In sum, it is unanimously accepted that the obligation to conduct an EIA in a transboundary context is part of customary international law. However, when this obligation applies and what it requires is still open to debate. The recent cases before the International Court of Justice opposing Costa Rica and Nicaragua offered an opportunity for the judges to develop their views on the matter, but the judgment, whilst delivering some further clarity, leaves many important questions unresolved. Two perspectives on the development of customary international law rules on EIA are offered by the judges, each leading to very different perceptions on the nature and content of the relevant rules. One could ask which of these views is to be preferred, but this might be the wrong question. It is not necessary to see the future of transboundary EIA as a mere choice between the methods proposed by Judge *ad hoc* Dugard and Judge Donoghue, but rather it is possible to accept that rules relating to transboundary EIA can stem from *both* state practice/*opinio juris* and from a general obligation of due diligence. Indeed, acknowledging both methodologies for deriving rules of custom, whilst being clear about the opportunities and limits of the method to be employed in each, is probably the best means of ensuring that customary international law develops in such a manner as to promote adequate levels of environmental protection. Moreover, it is important to remember that not all of our attention should be focused on customary international law and further efforts should be made to promote the widespread acceptance of the Espoo Convention as a treaty to provide a more specific set of minimum standards for transboundary EIA, whilst

³³ Separate Opinion of Judge Bandhari para 32. See also para 33.

³⁴ The Court refused to consider the application of the Espoo Convention in the Pulp Mills case for the simple fact that neither Argentina nor Uruguay were parties; *Pulp Mills* (n 4) para 205.



also encouraging states to accept the compulsory settlement of dispute under the Convention in accordance with Article 15.³⁵ After all, what the jurisprudence of the ICJ to date does demonstrate is that international courts and tribunals can play an important role in settling disputes concerning transboundary EIA.

³⁵ Art 15 of the Espoo Convention invites states to accept either arbitration or the International Court of Justice as a means for the settlement of disputes under the Convention, but such acceptance only applies insofar as the other party to the dispute has also accepted the same forum. To date, only Austria, Bulgaria, Liechtenstein, and the Netherlands have accepted one or both of the means of dispute settlement under art 15.